TESTIMONY OF RICHARD D. KOMER

to the

HOUSE JUDICIARY SUBCOMMITTEE ON THE CONSTITUTION

September 17, 2002

First, I would like to thank Chairman Sensenbrenner and the Subcommittee for inviting me to this oversight hearing on the significance of the Supreme Court's school choice decision. As you may know, my colleagues and I at the Institute for Justice represented parents whose children received scholarships through the Cleveland program upheld by the Supreme Court, so the decision in favor of the constitutionality of the program was a source of great personal satisfaction and relief. Our clients' children's educational futures were on the line, along with those of roughly forty-four hundred other children whose families had used the scholarships to escape from some of the worst public schools in the nation. All of our clients, like the vast majority of the other families in the program, could not afford to send their kids to private schools without the help of the scholarships, and faced the prospect of having to return their children to their neighborhood public schools if the Supreme Court did not overturn the decision of the Sixth Circuit. Fortunately, it did, and our clients' children could continue receiving that most vital benefit that society can provide, a decent education.

But you want to hear my views on the broader significance of the Cleveland decision. One interesting question is whether the *Zelman* decision represents a substantial development in the Supreme Court's First Amendment jurisprudence. In my view, the answer is both yes and no. It is "yes" in the sense that it has resolved an open question that was critical to a growing number of cases of great public policy significance. It is "no" in the sense that it's outcome was plainly

foreshadowed by a lengthy string of prior Supreme Court cases that laid down the basic principles that it applied.

The ambivalence in this answer is reflected in the positions of the majority and minority on the Court. The majority opinion , authored by Chief Justice Rehnquist, and joined by Justices Kennedy, O'Connor, Scalia and Thomas, clearly approaches the case as an extension of well-established principles reflected in a string of decisions dating back at least as far as *Mueller v. Allen* from 1983, and including *Witters v. Washington Department of Services for the Blind* from 1986 and *Zobrest v. Catalina Foothills School District* from 1993. The majority views these decisions as establishing a binary principle, namely that where a government sets up a religiously-neutral program that includes religious options and allows individual beneficiaries to make a free and independent choice among those options, the Establishment Clause is satisfied, even if the religious institutions selected by particular beneficiaries receive an indirect and incidental benefit.

Justice O'Connor agrees with this assertion of incrementalism in her separate concurrence, which appears to be written specifically to rebut arguments made by Justice Souter in his dissent to the effect that the majority's position represents a radical break with past precedent. It is important to note that Justice O'Connor joins in all of the Chief Justice's opinion, which makes it an opinion of the Court, unlike her concurrence in *Mitchell v. Helms*, in which she wrote separately without joining Justice Thomas' plurality opinion. Unlike *Mitchell* where she believed the plurality was going too far from past precedents, in *Zelman* she clearly believes the majority's opinion is consistent with past precedent.

It is, of course, the dissenters who argue strenuously, and quite disingenuously, that *Zelman* represents a huge break with past decisions and past principles. They base this

contention primarily on the Court's decision in *Nyquist v. Committee for Separation of Church and State*, a 1973 decision that has been the linchpin of school choice opponents throughout the past twelve years that these cases have been litigated and which was the primary precedent relied upon by the trial and appellate courts below in the *Zelman* litigation. In *Nyquist*, the Court found that a multi-faceted program New York State has passed was in fact "one of the ingenious schemes that periodically reach this Court designed to aid religious schools." At that time, reticent to find that a State acted with a purpose of aiding religion, the first prong of the *Lemon v. Kurtzman* tripartite Establishment Clause test, the Court struck down the program as violative of the second prong as having a "primary effect" of advancing religion.

The program in *Nyquist* had combined three separate components, maintenance grants made directly to religious schools, small grants to low-income individuals for tuition to private schools, and state income tax deductions designed to confer an equal financial benefit on somewhat better-off taxpayers. Well over 90% of the beneficiaries of these latter two components sent their children to parochial schools and this, coupled with the direct nature of the maintenance grant component of the program and the fact the program only provided benefits to families electing to send their children to private schools, led the court to conclude that the intention of the program was to further religious education.

Because the tuition grants and deduction components shared surface similarities with the scholarships provided by school choice programs such as that in Cleveland and a slightly older program in Milwaukee, to say nothing of the more than century old tuition programs in Maine and Vermont, courts have often bought choice opponents' arguments that *Nyquist* controls the scholarship or voucher issue. Proponets of these programs, on the other hand, have consistently sought to distinquish *Nyquist*. If you were paying close attention earlier, you noticed that I said

that the *Zelman* majority found precedential support of choice programs "at least as far back as the *Mueller v. Allen* decision of 1983." *Mueller* addressed a Minnesota state income tax deduction for school expenses, where well over 90% of the deductions were taken for tuition paid to religious schools. And the Mueller majority had to distinquish *Nyquist*, then only ten years old. It did so on the basis of a footnote in *Nyquist* itself, footnote 38, in which the Court expressly reserved for the future the constitutionality of a program like the G.I. Bill or a scholarship program that provides individual beneficiaries with benefits without regard to whether they select a public or private institution. The principle enunciated in that footnote about the provision of individual benefits under a religiously-neutral program are the precise basis on which the *Mueller-Witters-Zobrest* line of cases distinquished *Nyquist*.

Additionally, I would point out that in the very same 1973 term that it decided *Nyquist*, the Court dismissed another case for want of a substantial federal question (which is a type of decision accorded precedential status). This case, *Durham v. McLeod*, involved a South Carolina program of grants to college students that could be used at religious colleges, as well as public and non-religious private colleges. That program was a lot like the Pell Grant Program we are familiar with today, and not even the most committed opponents of school choice programs suggest that it is unconstitutional to permit college students to use their Pell Grants at religious schools. Consequently, it is fair to say that from the moment *Nyquist* was decided in 1973, the court was careful to distinquish religiously-neurtral programs such as that at issue in *Zelman*.

Indeed, for the true cognoscenti among you, it is apparent that from the earliest decisions in which the modern Supreme Court incorporated the federal constitution's religion clauses against state action in the 1940's through the Fourteenth Amendment, the Court has used religious neutrality as a necessary condition for an aid program to include persons choosing

religious schools for their children. In its 1947 *Everson* decision, which first applied the Establishment Clause against the states, the Court upheld New Jersey's provision of transportation subsidies to the families of all its schoolchildren, including those attending parochial schools. The court went so far as to intimate that to exclude the families choosing religious schools would itself violate the constitution. This decision was followed in 1968 by the *Allen* decision upholding against an Establishment Clause challenge New York's program of loaning free secular textbooks to all students' families, including those choosing religious schools for their children's educations. In short, *Zelman* can claim a rich heritage in the modern precedents of the Supreme Court.

In point of fact, I believe that the *Zelman* dissenters really recognize this, and their dissatisfaction is not limited to *Zelman* alone. When I said the dissenters were disingenuous in their claims that *Zelman* represents a radical expansion of Supreme Court precedent, I was referring to the fact that Justice Souter, to take an example, recognized in his dissents in the *Rosenberger* and *Mitchell* cases, which involved forms of institutional (as opposed to individual) aid, that the Court had previously approved religiously-neutral individual aid where any aid reaching religious schools was the result of free and independent individual choices. Rather than acknowledge that in fact the Court's precedents lead inevitably to the outcome in *Zelman*, his dissent really challenges the whole thrust of the Court's Establishment Clause aid cases from *Everson* on. This is an incredibly radical departure from precedent, far more radical in nature and scope than the *Zelman* majority's extension of long-standing and coherent precedent to a slightly new fact pattern.

Nor do the *Zelman* dissenters merely express a desire to overturn 55 years of their Court's precedents. They also boldly state they will not be bound by those precedents, including *Zelman*,

in future cases, and express a yearning for the day that changes in the Court's personnel will allow them to overrule these decisions they abhor. So much for the rule of law. Imagine the public reaction if the Court had overruled *Roe v. Wade*, a decision whose legal underpinnings are vastly weaker than *Everson*'s. Their legal rule seems to be that conservative justices must abide by liberal decisions they detest, but liberal justices are free to disregard conservative precedents they hate. Such double standards are repugnant to any coherent approach to the rule of law and should concern all citizens who purport to believe in a judiciary governed by the rule of law and not men.

Enough about the *Zelman* decision itself, and its significance in constitutional jurisprudence. The majority is clearly correct in viewing it as consistent with an extensive series of cases distinquishing *Nyquist*, and the dissenters clearly incorrect in maintaining it is a radical departure from past precedent. *Zelman*'s real significance lies in its consequences for public policy.

What is radical about *Zelman* is the sort of educational reforms it opens up. The vast majority of Americans have always exercised certain forms of school choice, even after the advent of the free public school system characterized by mandatory assignment to schools. We just aren't accustomed to thinking of it as school choice when a family chooses to buy a home in a particular school district because of the reputation of its schools, or when a family decides to pay to send its children to a private school, but both sorts of families are exercising school choice. And public school districts where many or most of its families can afford to exercise these forms of school choice are quite aware that despite their local monopoly, their clientele does have other options they can pursue if they become dissatisfied enough.

Conversely, however, public school districts where few families have the financial wherewithall to exercise these forms of school choice are also aware that they are serving a captive population whose dissatisfaction will not lead to a decline in usage of their services. Such districts lack a key motivator that districts serving a more affluent clientele have, because they know that no matter how poor the service they provide, they won't lose customers, at least until after the kids exceed the age for compulsory education and they can drop out, which inner city school district kids continue to do in shocking numbers. And *mirabile dictu*, what do we find, but that the poorer the school district's population is, the worst the district's educational performance is.

Please note that I deliberately did not say the less money a district spends on its kids the worse the educational performance. As result of so many school finance equity lawsuits having succeeded in state supreme courts, many states are spending equal, and in some cases dramatically larger, amounts of money in their poorer districts. But oftentimes to no avail. Spending in the 30 poorest districts in New Jersey, for example, which has taken school equity about as far as it can go, is equalized to the very wealthiest districts in that state, not some state average. Approximately $13,000 per student is being spent and student performance remains abysmal.

What *Zelman* makes possible, by removing the constitutional cloud that has always obscured such programs, are voucher-type programs like those in Cleveland and Milwaukee. These programs seek to catalyze educational reform in inner city school districts, which is where our worst problems remain despite decades of failed reform efforts, by empowering families to exercise the same choice wealthier families routinely exercise. In short, to let them choose the school their children will attend, even if it's private, even if it's religious. Faced at last with the

potential loss of significant numbers of its formerly captive clients, the inner city school districts will finally have a reason to become more responsive to their clients' needs.

The developments in Milwaukee, which has the longest-running of the inner city school choice programs, and where the court challenges were resolved in favor of the program's constitutionality in 1998, prove the hypothesis that increased competition from private schools triggers positive responses from the public school district. I'm not an educator, and I won't bore you with the details of that program's success as a catalyst for change. For our purposes, it is enough to know that *Zelman* allows us to argue about the policy merits of these programs in a way that was never possible before, when the opponents of these programs first line of defense was the assertion that these programs couldn't be considered because they were manifestly unconstitutional.

Lest we get too carried away by the prospects of public policy debates over the merits of vouchers, or educational tax credits, the other primary type of program for enhancing parental choice and thus catalyzing educational reform, I have to briefly note that the federal constitutional argument has always been one of two strings to our opponents' legal bow. The other string has always been state constitutions' religion clauses. Our opponents have always preferred to get parental choice programs struck down on state constitutional grounds because the U.S. Supreme Court is much less likely to review such decisions than ones involving the federal religion clauses. Thus in the cases upholding the constitutionality of the Cleveland and Milwaukee choice programs and the tax credit programs in Arizona and Illinois, before we won on the federal religion clause challenges, we had to prevail in state courts on the state constitutions' religion clauses.

Nor have we been uniformly successful in these endeavors. There are two primary sorts of state constitution religion clauses. Approximately 38 states have what are known as Blaine Amendments in their constitutions, which essentially say that state governmental entities cannot appropriate money to aid sectarian institutions. And approximately 29 states have "compelled support" clauses in their constitutions, which say in essence that no one shall be compelled to support a church or religious ministry without his or her consent. Obviously, many states have both types of provisions; only three (Louisiana, Maine, and North Carolina) have neither one. Thus, these provisions represent a potentially major impediment to parental choice programs if they are interpreted broadly to prohibit them. For your information, I've attached to this testimony a map showing which states' constitutions have these sorts of provisions and a representative example of each sort of provision. I've also included some frequently asked questions about these provisions and my responses.

In the course of our school choice litigation over the past twelve years, two supreme courts, one under each type of provision, has held that their constitution prohibits letting parents choose to send their children to a religious school with money from a school choice program. In 1994, the Puerto Rico Supreme Court invalidated an innovative school choice program there based upon the Commonwealth's constitution's Blaine Amendment. And in 1999, the Vermont Supreme Court held that Vermont's compelled support provision prohibited allowing parents to choose a religious school with tuition paid by the towns. Very recently, a trial court in Florida held that Florida's Opportunity Scholarship Program violated the Florida Blaine Amendment by permitting parents to use scholarships to attend religious schools. Fortunately, the Program continues pending the appeals that have been filed and we are cautiously confident that we will get that ruling overturned on appeal.

Fortunately, a number of states with these sorts of provisions do not view them as an impediment to a properly structured school choice program. These states tend to interpret their state religion clauses to parallel the federal religion clauses, so that a program that passes muster under *Zelman* passes muster under the state constitution. But a number of states besides Vermont have in the past interpreted their state language to be more restrictive. We believe that such restrictive interpretations infringe a number of federal constitutional provisions and plan to attack such interpretations as violations of federal constitutional rights. Ultimately our goal is to get the U. S. Supreme Court to rein in these overly broad state interpretations, thereby making the *Zelman* standard universally applicable.

Briefly, our position is that the federal constitution requires that if a school choice program allows parents to select a private school for their children's education, then parents must be allowed to select private religious schools, too. The free exercise of religion clause requires this and so does the Establishment Clause. After all, that Clause prohibits programs with a primary effect of hindering as well as advancing religion, and excluding the choice of religious schools from an otherwise free and independent choice is to discriminate against religion, thereby violating the mandate of religious neutrality embodied in the religion clauses. Such discrimination against religion also violates the Free Speech Clause by discriminating against the religious viewpoint and violates the Equal Protection clause by discriminating on a suspect classification without a rational basis, let alone being narrowly tailored to a compelling need. Interpreting these state provisions requires a real stretch to make them applicable to school choice programs that empower parents to choose private schools, including religious ones. Both sorts of provisions were designed to address specific situations bearing little resemblance to school choice programs. The Blaine Amendments, in particular, resulted from outright religious

bigotry, having been designed to rebuff Catholic demands for a direct public subsidy equal to those going to the public schools, which were at that time distinctly Protestant institutions, having been consciously designed and operated to promote a nondenominational brand of Protestantism.

Ironically, the Ninth Circuit recently decided a case in which it held that Washington State could not use its Blaine Amendment to excuse violation of the Free Exercise Clause. In *Davey v. Locke*, that court held that Washington could not exclude a theology student at a religious college from a merit scholarship program it made available to all other students attending private colleges. Washington defended on the basis of its Blaine Amendment, which it has interpreted very broadly in the past to preclude religious options that are permissible under the federal religion clauses. The court rejected this broad interpretation as a justification for religious discrimination, in much the same way that the U. S. Supreme Court rejected Missouri and Virginia's efforts to use their more restrictive interpretations in *Widmar* and *Rosenberger*, respectively.

Nor are Congress' hands clean in this matter-when Congress failed to pass the federal Blaine Amendment by the necessary supermajorities required for a federal constitutional amendment, Congress required in its enabling legislation that new states entering the union include Blaine Amendments in their new state constitutions. Consequently, all states admitted since 1875 have Blaine Amendments as a condition of statehood, which is also how Puerto Rico came to have a Blaine Amendment in its Commonwealth constitution. As a product of raw religious bigotry, these Amendments are a stain on America's claim to religious liberty and equal treatment under the law. They must not be permitted to perpetuate their legacy into a new century, and certainly cannot be permitted to thwart the most promising educational reform

currently under consideration. The educational future of our most vulnerable citizens demands that these sorry remnants of a shameful past be discarded on the ash heap of history where they belong.

Thank you for the opportunity to provide you my views, and I'd be happy to try and answer any questions you have.

SCHOOL CHOICE:
Answers to Frequently asked Questions about State Constitutions' Religion Clauses

By
Richard D. Komer
Sept. 6, 2002

1. Why are the opponents of parental choice suddenly focusing on state constitutions' religion clauses as a means of derailing school choice programs?

Actually, there is nothing new about parental choice opponents' efforts to thwart school choice by using state constitutions' religion clauses. They have always preferred to challenge parental choice programs on state constitutional grounds, because it is harder for the defenders of choice programs to obtain U.S. Supreme Court review of such decisions. What is new is that they no longer have the second string to their bow, which was their claim that parental choice programs violate the U.S. Constitution's Establishment Clause. Their defeat in *Zelman v. Simmons-Harris*[1] eliminated that line of attack, leaving them with the state constitutions as their only alternative.

Thus, in those cases where IJ and our allies have successfully defended parental choice programs, we have already confronted and overcome claims that state constitutions' religion clauses are violated by parental choice programs. For example, the Cleveland program upheld in *Zelman* had been previously litigated in state court, concluding in a decision by the Ohio Supreme Court that the program did not violate the state constitution's religion clause.[2] Similarly, our opponents challenged the Milwaukee parental choice program, on which the Cleveland program was modeled, on state religion clause grounds and were rebuffed by the Wisconsin Supreme Court.[3] The Arizona Supreme Court likewise rejected a challenge to the Arizona school choice tax credit based on Arizona's religion clause, as did the Illinois Court of Appeals with respect to Illinois' tax credit.

On the other hand, our opponents have successfully used state religion clauses to thwart the inclusion of religious school options in two cases, one in Puerto Rico and another in Vermont. And they recently convinced the trial court in Florida to rule that the Opportunity Scholarship Program there violated the state religion clause. Fortunately, that decision[4] has been stayed pending appeal, and we are hopeful that the decision will be reversed on appeal.

2. Did the Florida decision involve a Blaine Amendment? What exactly are Blaine Amendments?

Yes. Florida's religion provision is a Blaine Amendment. The Blaine Amendments are the most common type of religion clause found in state

---

[1] 122 S. Ct. 2460 (2002).
[2] *Simmons-Harris v. Goff*, 711 N.E.2d 203 (Ohio 1999).
[3] *Jackson v. Benson*, 578 N.W.2d 602 (Wisc.), *cert. denied*, 525 U.S. 997 (1999).
[4] *Holmes v. Bush*, [cite].

constitutions. By our count, they are found in 38 state constitutions, although their language varies and some interpretation is involved in classifying a provision as a Blaine Amendment. For our purposes, we consider any provision that specifically prohibits state legislatures (and usually other governmental entities) from appropriating funds to religious sects or institutions (often specifically including religious schools) to be a Blaine Amendment.

The Blaine Amendments are named after a failed federal constitutional amendment introduced in the U.S. Congress by Senator James G. Blaine of Maine in 1875. It was directed primarily at efforts by Catholics to obtain a share of funding for their schools, which they had created because of their unwillingness to send their children to the public schools, which were Protestant in orientation. Although the public schools of that period were called "nondenominational," that appellation did not mean that they were non-religious or secular in today's terms. It meant that they did not teach the doctrine of any particular Protestant sect or denomination in the course of conducting religious activities, such as school prayer, Bible reading and lessons, and hymn singing. Understandably, Catholics and certain other religious groups were unwilling to participate in the public schools and maintained their own schools.

When Catholics began agitating for equal funding for their schools, politicians such as Blaine got into the act because the vast majority of Catholics were Democrats, while the Republicans who controlled Congress tended to be white, Anglo-Saxon Protestants.[5] Blaine and the Republicans turned the school aid demands of the Catholics into a political issue and proposed their amendment to prevent the legislature from meeting the Catholics' demands for equal treatment of their schools. Although the amendment easily obtained a majority of votes in both the House of Representatives and the Senate, in the Senate it failed to obtain the super-majority required for a constitutional amendment.

Despite their narrow defeat in the Senate, the backers of the Blaine Amendment succeeded over the next quarter century in promoting their anti-Catholic agenda by requiring that newly formed states include Blaine Amendment language in their state constitutions as a condition for admission to the union. Additional states added Blaine language on their own, joining still other states whose Blaine-like language pre-dated even the federal effort and provided models for Blaine's efforts.[6] Today, all of the Western states' constitutions have Blaine Amendments in them, and perhaps half of the states east of the Mississippi do also.

3. What about the other states that don't have a Blaine Amendment—do their state constitutions contain religion language that poses a potential problem for parental choice efforts?

Yes. Although the Blaine Amendments are the most common type of state religion clause, there is another very common provision that we call "compelled support" provisions. In fact, 29 states have this sort of language in their

[5] It is during this precise period that a Republican characterized the Democrats as the party of "Rum, Romanism, and Rebellion."
[6] For example, Massachusetts adopted the earliest Blaine-like language in the 1850's, during an earlier wave of anti-Catholic sentiment that was a reaction to increased Catholic immigration and fueled the Know-Nothing movement, which briefly captured control of the Massachusetts state government.

constitutions, so, obviously, many states have both compelled support and Blaine Amendment language. Only three states, Louisiana, Maine, and North Carolina have neither sort of language. The common component of a compelled support clause is language providing that no one shall be compelled to attend or support a church or religious ministry without his or her consent. Sometimes the language will specifically include religious schools in the entities that cannot be supported.

The historical antecedents of these provisions are much older than the Blaine Amendments and addressed a different concern, the colonial era practice of requiring church attendance and support for the colony's established church. Thus, this sort of provision can be found in some of the earliest states' constitutions, such as Pennsylvania, Vermont and Virginia, dating from the 1770s. Of the states west of the Rocky Mountains, only Idaho has a provision like this—there is a pronounced eastern bias to the map of states with compelled support provisions.

4. What is the legal argument that parental choice programs violate these Blaine Amendments?

Much like their theory under the federal establishment clause, the opponents of parental choice programs argue that providing student assistance to families opting for a religious school for their children's education is the equivalent of providing aid directly to the religious schools themselves. Although the Blaine Amendments were obviously designed to address direct aid to the schools themselves, which was, after all, what Catholics were requesting at the time the Blaine Amendment was created, the opponents of choice wish to extend the language to encompass money that incidentally reaches religious school coffers because parents have selected to spend their scholarships there.

The U.S. Supreme Court definitively rejected this theory under the establishment clause in *Zelman*, holding that where the scholarship program is religiously-neutral, *i.e.*, neither favoring nor disfavoring the choice of religious schools, and where the parents made a free and independent choice of a religious alternative for their children's education, the aid is not to be treated the same as direct aid to the religious schools. Parental choice opponents hope that the state supreme courts will nonetheless adopt a broader construction of their states' Blaine amendments that will be more restrictive of parental choice than the federal establishment clause. Our counterargument is the same as under the establishment clause: that scholarship/voucher programs aid families, not schools, and that not one dime reaches a religious school but for the free and independent choice of a parent.

5. Is the legal argument under the "compelled support" clauses similar to that under the Blaine amendments?

Yes. Parental choice opponents argue that when people's taxes are used to pay tuition for children whose parents have enrolled them in religious schools it is tantamount to compelling people to pay taxes to be given to a church, ministry or church school. This is, of course, a far cry from the practice of tithing that the compelled support clauses were originally intended to combat, where the government served as a tax collector for an established church. Nonetheless, the opponents of parental choice programs insist that these provisions prohibit giving

assistance to families if they choose a religious option for their children's education.

6. How successful have these anti-choice arguments been so far?

Not very successful. We have successfully repelled attacks on parental choice programs based on Blaine Amendments in Arizona,[7] Illinois,[8] and Wisconsin.[9] On the other hand, as we mentioned previously, opponents succeeded in nullifying the Puerto Rico parental choice program by an attack based on the Commonwealth's constitution.[10] As with so many of the newer states, Puerto Rico's constitution contains a Blaine Amendment because the congressional enabling act that permitted Puerto Rico to become a commonwealth required it. And the trial court in Florida ruled against the Opportunity Scholarship Program there based on a Blaine Amendment, although we are confident that decision will be reversed on appeal.

In states with compelled support clauses, we successfully defended parental choice programs against attack in Illinois,[11] Ohio,[12] and Wisconsin.[13] On the other hand, we lost in Vermont where the Vermont Supreme Court ruled that its clause required the exclusion of the option of choosing a religious school from Vermont's tuitioning system.[14] (Under that system, approximately 90 school districts tuition their high school students to the public or private high school the parents choose, in lieu of operating their own public high school.) Despite the fact that parents had the option of choosing religious schools from the inception of the program in 1869 until the Vermont court ruled it violated the establishment clause in 1961[15] (a decision the Vermont Supreme Court itself reversed in 1994[16]), the Court ruled that inclusion of the option would be compelled support of a ministry.

7. What does the future hold with respect to these state constitutions' religion clauses?

We have a pretty good idea based on past precedents how some states would approach their religion clauses. The question is which states are likely to construe their clauses to parallel that given to the establishment clause of the federal constitution and which states are likely to construe their provisions more restrictively vis-à-vis parental choice programs. Because the question of parallel interpretation has come up before in some states, we can look at past case law to aid in predicting how that state's supreme court might rule.

---

[7] *Kotterman v. Killian*, 972 P.2d 606 (Ariz.), *cert. denied*, 528 U.S. 921 (1999).
[8] *Griffith v. Bower*, 319 Ill. App. 3d 993 (5th Dist.), *app. denied*, 195 Ill. 2d 577 (2001); *Toney v. Bower*, 318 Ill. App. 3d 1194 (4th Dist.), *app. denied*, 195 Ill. 2d 573 (2001).
[9] *Jackson v. Benson*, 578 N.W.2d 602 (Wisc.), *cert. denied*, 525 U.S. 997 (1999).
[10] *Asociacion de Maestros v. Torres*, 137 D.P.R. 528, 1994 PR Sup. LEXIS 341.
[11] *Griffith* and *Toney*, *supra* note 9.
[12] *Simmons-Harris v. Goff*, *supra* note 2.
[13] *Jackson v. Benson*, *supra* note 10.
[14] *Chittenden Town Sch. Dist. v. Dep't of Ed.*, 169 Vt. 310, 738 A.2d 539 (1999).
[15] *Swart v .South Burlington Sch. Dist.*, 122 Vt. 177, 167 A.2d 514 (1961).
[16] *Campbell v. Manchester Bd. of Sch. Dirs.*, 161 Vt. 441, 641 A.2d 352 (1994).

When in the past the U.S. Supreme Court has approved the inclusion of the families choosing religious schools in a program, such as transportation subsidies in *Everson v. Board of Education*[17] and free secular textbooks in *Board of Education v. Allen*,[18] many state legislatures responded by passing similar programs, which the same groups that now attack parental choice programs challenged as violations of these state religion clauses. Some of those earlier lawsuits were successful in persuading the state supreme courts to take a more restrictive view of permissible aid to families, while other supreme courts opted for a parallel interpretation. For these states, both parallel or non-parallel in their interpretations, we have a pretty good indicator of how those courts will rule in the future. The remaining states, which have not confronted the issue to date, are unknown territory.

For example, Washington epitomizes a state that has taken a more restrictive view. When the state legislature passed a transportation program allowing families with children in religious schools to participate on an equal basis with all other families, the Washington Supreme Court ruled that the state Blaine Amendment forbade such equal treatment.[19] Similarly, after the U.S. Supreme Court unanimously ruled that the establishment clause was not violated if Washington allowed a resident eligible for vocational rehabilitation to use his funding to attend a religious college and pursue a religious vocation, the Washington Supreme Court held that to do so would violate its Blaine Amendment.[20]

Illinois, on the other hand, epitomizes a state that interprets its state constitution's religion clauses in a parallel fashion to the federal guarantees. Despite having both Blaine and compelled support language in its constitution, Illinois interprets those provisions in lockstep with the free exercise and establishment clauses.[21]

A lot of states, however, fall into neither category, usually because their courts just have not confronted this issue before. Those states' courts' reaction to the question of whether to interpret their religion clauses to parallel the federal Constitution is impossible to predict with any degree of confidence. Many states fall into this category, so it is important to see how the next few cases go. Fortunately, there is an increasing recognition that the state Blaine Amendments in particular were conceived in an atmosphere of religious animus that counsels great caution in applying them expansively, as parental choice opponents would have courts do.

8. What do you mean by "increasing recognition"?

Most importantly, several members of the U.S. Supreme Court have recognized that the Blaine Amendments reflect an anti-Catholic legacy that is unworthy of the Court's approval. In *Mitchell v. Helms*,[22] Justice Thomas stated

---

[17] 330 U.S. 1 (1947).
[18] 392 U.S. 236 (1968).
[19] *Visser v. Nooksack Valley Sch. Dist. No. 506*, 207 P.2d 198 (Wash. 1949).
[20] *Witters v. Washington Comm'n for the Blind,* 771 P.2d 1119 (Wash. 1989). .
[21] See *Griffith* and *Toney*, *supra* note 9.
[22] 530 U.S. 793 (2000).

in his plurality opinion, which was joined by Chief Justice Rehnquist and Justices Kennedy and Scalia, that:

> [H]ostility to aid to pervasively sectarian schools has a shameful pedigree that we do not hesitate to disavow. .... Opposition to aid to "sectarian" schools acquired prominence in the 1870's with Congress's consideration (and near passage) of the Blaine Amendment, which would have amended the Constitution to bar any aid to sectarian institutions. Consideration of the Amendment arose at a time of considerable hostility to the Catholic Church and to Catholics in general ....[23]

Justice Breyer likewise seems to recognize the Blaine Amendment's anti-Catholic "pedigree" in his dissent in *Zelman*, which was joined by Justices Stevens and Souter, when he implies that anti-Catholic sentiment "played a significant role in creating a movement that sought to amend several state constitutions (often successfully), and to amend the United States Constitution (unsuccessfully) to make certain that government would not help pay for 'sectarian' (*i.e.*, Catholic) schooling for children."[24]

Nor is the U.S. Supreme Court the only court to recognize the Blaine Amendment's "shameful pedigree." In rejecting the challenge brought by parental choice opponents to Arizona's school choice tax credit, the Arizona Supreme Court stated that "[t]he Blaine Amendment was a clear manifestation of religious bigotry, part of a crusade manufactured by the contemporary Protestant establishment to what was perceived as a growing 'Catholic menace.'"[25] The Court declined to give a broad reading to language it said it would be "hard pressed to divorce from the insidious discriminatory intent that prompted it."[26]

Both the U.S. and Arizona supreme courts relied on recent scholarship delineating the Blaine Amendments' origins in religious discrimination.[27]

9. Does the federal Constitution limit the interpretation of these state religion clauses in any way?

Yes, in our opinion. Not only are members of the U.S. Supreme Court showing increasing recognition that the state Blaine Amendments have a discriminatory pedigree, but the Court has decided a number of cases where it has refused to countenance states' efforts to justify infringements on free speech/free exercise rights based on expansive interpretations of their Blaine Amendments. For example, in *Widmar v. Vincent*,[28] the Court refused to let Missouri justify its denial of religious groups equal access to campus facilities at the University of Missouri on the basis of the Blaine Amendment and compelled support clauses in its state constitution. Similarly, in *Rosenberger v. Rectors & Visitors of the*

---

[23] *Mitchell*, 530 U.S. at 828.
[24] *Zelman*, 122 S. Ct. at 2504 (Breyer, J., dissenting).
[25] *Kotterman v. Killian*, 972 P.2d 606, 624 (Ariz.), *cert. denied*, 528 U.S. 921 (1999).
[26] *Id.*
[27] See, *e.g.*, Joseph Viteritti, *Blaine's Wake:School Choice, the First Amendment, and State Constitutional Law*, 21 Harv. J.L. & Pub. Pol'y 657 (1998); and Stephen K. Green, *The Blaine Amendment Reconsidered*, 36 Am. J. Legal Hist. 38 (1992).
[28] 454 U.S. 263 (1981).

University of Virginia,[29] the Court refused to let Virginia justify its denial of student fee subsidies to a religious student publication on the basis of Virginia's Blaine Amendment and compelled support language. Missouri and Virginia happen to be two states that, like Washington, have consistently interpreted their religion clauses expansively to restrict parental choice.

When a state denies a student or his or her family educational assistance because that student is attending a religious school, while providing such assistance to those students whose families have chosen non-religious private schools for their children, it is discriminating on the basis of religion. Where the family is religiously-motivated in choosing the religious school, the discrimination denies the free exercise of religion, as well as constituting view-point discrimination under the free speech clause of the First Amendment. By classifying on the basis of religion (a suspect classification that must be subjected to strict scrutiny) without a compelling need to do so, the state denies those persons choosing religious schools the equal protection of the laws under the Fourteenth Amendment. And by violating religious neutrality and directly hindering religion versus non-religion, the state violates the establishment clause of the First Amendment as well. Under the supremacy clause of the U.S. Constitution, courts must avoid state constitutional interpretations that infringe upon federally-protected rights, and thus we believe that the restrictive interpretations of the state constitutions' religion clauses violate federal rights.

10. What do you plan to do about these restrictive interpretations of state religion clauses?

First, we plan to continue to help defend parental choice programs that states pass, as in Florida, from attacks based on restrictive readings of state religion clauses. Second, we plan to affirmatively attack these restrictive interpretations in lawsuits brought in states with a history of so interpreting their constitutions. We will allege that by excluding the choice of religious options in parental choice programs the states are violating federally protected rights.

We intend to target both Blaine Amendment states and compelled support states in order to make sure that neither sort of religion clause is interpreted in such a way that it presents a barrier to the full exercise of federal rights. Our first two such lawsuits will be in Vermont, which has a compelled support provision, and Washington, which has a Blaine Amendment. We are encouraged by the Ninth Circuit's recent decision in *Davey v. Locke*,[30] which held that Washington could not exclude from its college merit scholarship program a student who was pursuing a theology degree from a religious college. The court refused to accept Washington's defense that its Blaine Amendment required it to exclude the student.

Ultimately, we expect that the U.S. Supreme Court will have to address this issue, as it did in *Zelman* with the issue of whether the establishment clause permitted scholarship recipients to select religious schools. Towards that end, cases will be selected with an eye to developing conflicts among the subordinate

[29] 515 U.S. 819 (1995).
[30] 2002 U.S. App. LEXIS 14461 (9th Cir.).

appellate courts, state and federal. We are confident that in the end the Supreme Court will rule in favor of liberty and ensure that these state constitutional provisions are not used as vehicles for discriminating against those families who, for whatever reasons, prefer to educate their children in religious schools.

The Author

Richard D. Komer is a senior litigation attorney at the Institute for Justice (IJ). Before joining the Institute in 1993, Komer served as a civil rights lawyer for 14 years in several federal departments and agencies, including service as Legal Counsel at the Equal Employment Opportunities Commission and as Deputy Assistant Secretary for Civil Rights at the U.S. Department of Education. At IJ he has worked on parental choice cases in Arizona, California, Florida, Illinois, Maine, Ohio, Pennsylvania, Vermont and Wisconsin.